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November 15, 2002

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.E. 98-57, Phase III

Dear Ms. Cottrell:

Verizon Massachusetts ("Verizon MA") hereby files copies of the Public Utility Commission of Texas ("Texas PUC") orders, referred to in the Company's Motion for Appeal of the Hearing Officer Ruling dated October 18, 2002. Verizon MA's Motion, at 18. *See* Attachment A. Those orders relate to the Texas PUC's recent decision to abate further proceedings to examine unbundling of Southwestern Bell Telephone Company's ("SBC") Project Pronto service, pending the outcome of the Federal Communications Commission's ("FCC") *Triennial Review*.[1] Verizon MA's Motion, at 19 n.21.

In the *Triennial Review*, the FCC is addressing, *inter alia*, its unbundling requirements, including the four-part packet switching test, and the appropriate role of the state commissions in implementing those requirements. *Triennial Review*, ¶ 75. This is necessary because the recent decision by U.S. Court of Appeals for the D.C. Circuit in *U.S. Telecom Association v. FCC*, 290 F.3d 415 (2002), vacated and/or remanded the FCC's unbundling requirements. Verizon MA's Motion, at 9-10; *see also* 47 C.F.R. § 51.319(c)(5). Accordingly, like the Texas PUC, the Department should abate further investigation on Verizon MA's Packet at the Remote Terminal Service ("PARTS") until the FCC's review is completed.

AT&T Communications' ("AT&T") and Covad Communications Company's ("Covad") comments on Verizon MA's Motion ignore the recent developments in Texas

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[1] *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (rel. Dec. 20, 2001) ("*Triennial Review*").

and suggest that the Department should forge ahead with its own investigation of unbundling PARTS in Massachusetts under an "impairment" standard. AT&T Comments, at 2; Covad Comments, at 3-4. As explained in Verizon MA's Motion, this is not only inconsistent with Department precedent[2] in D.T.E. 98-57, Phase III, but is also unlawful under the Telecommunications Act of 1996 (the "Act") and FCC rules. Verizon MA's Motion, at 4-5, 10.

Moreover, AT&T is being disingenuous because it has argued before the FCC against individual state determinations of unbundling requirements. In comments filed in June 1999 in the FCC's *UNE Remand* proceeding, AT&T declared that

> [a]ny process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress.

See Attachment B (excerpt from AT&T's Reply Comments, at 57-58).

As recognized by the FCC, Section 251(d)(3) of the Act does not permit states to add additional unbundling obligations that do not "meet the requirements of section 251 *and the national policy framework instituted in this Order*." *UNE Remand Order*, ¶ 154 (emphasis added). To do otherwise would also be inconsistent with Congress' determination that there should be a national unbundling standard to promote competition nationwide by replacing the patchwork of state and local regulations.[3]

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[2] Throughout this proceeding, the Department has looked to the FCC's rules and requirements as the guiding principles in addressing the unbundling issue. Verizon MA Motion for Appeal, at 10. Specifically, the Department found in the initial stage of this case that Verizon MA does not have the legal obligation to provide unbundled packet switching at this time because the FCC conditions are not satisfied - or unless the FCC modified its rules. D.T.E. 98-57, *Phase III Order*, at 88. The Hearing Officer's ruling effectively reverses the Department's ruling.

[3] For example, if the FCC concludes, as it should, in its *Triennial Review* that new advanced services facilities should not be unbundled because, *inter alia*, such a requirement would discourage investment in those facilities, a state requirement that those facilities be unbundled obviously would be inconsistent with the FCC's framework. That result would be inappropriate and would effectively reverse the FCC's determination, thereby undermining the FCC's goals of achieving a "national policy framework," as contemplated by the Act.

Although the underlying law remains unchanged, AT&T completely reverses its position in order to affect a change in FCC rules applicable to PARTS in Massachusetts. However, the Department has no authority to override the FCC's existing four-pronged test for unbundling PARTS-like services[4] by conducting its own "impairment" test, as AT&T and Covad incorrectly allege. Indeed, if the Department wishes to consider the unbundling of PARTS, it must do so in the context of the FCC's four-pronged test for packet switching. As Verizon MA previously demonstrated, those four conditions have not been met in Massachusetts. Verizon MA's Motion, at 16-18.

In addition, contrary to AT&T's and Covad's claims, unbundling PARTS is not necessary to prevent a "first-mover" advantage by Verizon MA. Competitive local exchange carriers ("CLECs") have access to PARTS under the same terms and conditions applicable to Verizon. Verizon MA's Motion, at 6, 23. CLECs were given ample notice of such terms and conditions (e.g., administrative, technical, operational and other network and process-related information, as well as a potential list of Massachusetts remote terminals where PARTS may potentially be deployed during 2002).

Moreover, the introduction of PARTS does not change the fact that CLECs continue to have access to unbundled voice-grade loops, xDSL loops, sub-loops, or line-shared loops pursuant to DTE Tariff No. 17 in their provision of telecommunications services to customers in areas where PARTS may be deployed. Verizon MA's Motion, at 4-5. PARTS merely provides a packetized signal to enable the data hand-off to the CLEC. Therefore, the parties' arguments are without merit.

Finally, AT&T's claims regarding Electronic Loop Provisioning ("ELP") are misleading and incorrect. AT&T Comments, at 11. Verizon MA cannot lawfully be required to provide CLECs with access to a "superior, as-yet unbuilt" network, as AT&T's theoretical ELP construct would require. Such a requirement would fly in the face of recent court decisions[5] that prohibit requiring the incumbent local exchange carrier to make specific investments - or deploy a specific technology or capability - so that it may then be unbundled.

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[4] The FCC has repeatedly held that Digital Subscriber Line Access Multiplexer ("DSLAM") functionality relating to a PARTS-like service configuration is part of the "packet switching" network element and, therefore, the four-part unbundling test under Rule 319 would apply. Verizon MA's Motion, at 2 n.2. To classify PARTS differently on the federal and state level makes no sense because the same facilities and technology are deployed. Therefore, until and unless the FCC reaches a different conclusion in its *Triennial Review*, the Department should not depart from the FCC findings that PARTS is a packet switching offering under Rule 319 and redefine the loop, as AT&T erroneously suggests. Verizon MA's Motion, at 15.

[5] *See Iowa Utilities Board. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and remanded in part, AT&T v. Iowa Utilities Board..*, 525 U.S. 366 (1999). The Eighth Circuit reaffirmed its holding on remand. *Iowa Utilities Board. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part on other grounds, remanded, Verizon v. FCC* , 122 S. Ct. 1646 (2002).

In addition, AT&T's insinuation that the Department should interject itself into Verizon MA's investment decisions is contrary to the Department's clearly stated policy. In D.T.E. 94-50, the Department ruled that

> [p]articularly in the rapidly evolving telecommunications industry, we do not believe that it would be appropriate for the Department to determine whether a given prospective investment is reasonable.

D.T.E. 94-50, *Interlocutory Order*, at 20 (Sept. 22, 1994). The Department reiterated that finding, stating that "we strongly disagree with the suggestion of some parties that the Department should adopt regulatory oversight of the Company's infrastructure investments regardless of the form of regulation." D.T.E. 94-50, *Order*, at 137 (May 12, 1995). Accordingly, there is no basis in this competitive environment for the Department to overturn its findings in D.T.E. 94-50 and enable other telecommunications providers, such as AT&T, to dictate how Verizon spends its capital dollars. Verizon MA's Motion, at 22.

Very truly yours,

Barbara Anne Sousa

Enclosure

cc: Jesse Reyes, Esquire, Hearing Officer (3)
Michael Isenberg, Esquire, Director – Telecommunications Division
Attached Service List